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Supreme Court of the United States.

244.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS, et al., Bankrupts,

Plaintiff-in-Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Brief in Reply.

FREDERICK M. CZAKI
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of Jacob M. Mertens *et al.*, bankrupts,
Appellant,

vs.

THE VARICK BANK OF NEW YORK,
Appellee.

Appellee's Brief in Reply, on Motion to Dismiss.

A.

A perusal of the appellant's brief and argument cannot fail to impress the Court with the fact that opposing counsel entirely misconceives the distinguishing characteristics between the corresponding provisions of the Acts of 1867 and 1898 relative to the vesting of the Trustee's title.

He attempts to impress this Court with the correctness of the proposition that under the Act of 1898, the title of the trustee *on* adjudication, vests *not as of the date of the adjudication, but as of the date of the filing of the petition.* (See p. 14 of Appellant's Brief.)

The Act of 1867 made no reference whatsoever to the date of the adjudication. It provided that as soon as an assignee was appointed and qualified, the judge or register by instrument, assigned and conveyed to the assignee all of the property of the bankrupt.

> "And such assignment *shall relate back to the commencement of the proceedings in bankruptcy,* and by operation of law vest the title to all such property and estate, both real and personal, in the assignee, etc."
>
> U. S. Rev. Stat., § 5044.

Section 70 of the act of 1898 provides,

> "The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

A comparison of these sections discloses that in the latter, there is omitted the provision that the trustee's title "shall relate back to the commencement of the proceedings in bankruptcy," *i. e.* the filing of the petition.

To sustain the appellant's contention would do violence to the language of the section, and obviously fail to give any weight to the omission of the phrase that such title "shall relate back to the commencement of the proceedings in bankruptcy."

As was said by this court in *Pirie vs. Chicago Title & Trust Co., 182 U. S., 438-448,*

> "Was this omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition.

> Was it left out in words to be put back by construction, taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy? There is presumption against it. When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose. This rule we lately applied in Bardes *v.* First National Bank of Hawarden, 178 U. S., 524."

In effect, appellant's contention seems to be that Sub-division 5 of § 70a operates as enlarging the provisions of paragraph A and vesting the title of the trustee as of the date of the filing of petition.

Clause Five of Paragraph A of this section, as well as the others numerically designated, simply specifies the *character* of the property to which the title of the trustee shall vest, but in no sense operates as to *when* it shall vest.

Sub-division E of the same section wholly negatives the appellant's contention by providing that the trustee may avoid any transfer which any creditor might have avoided, unless the transferee was a bona fide holder for value *prior to the date of the adjudication,* thus clearly manifesting Congress's intention that up to the date of adjudication, the bankrupt could convey wholly or conditionally, any of his property, so long as it was not in fraud of creditors.

Hewett vs. Berlin Machine Co., 194 U. S., 296-302.

B.

The appellant contends that the facts stipulated were ample justification for, and require the findings made by the Referee and the District Court to the effect that the sale of the policies was in

fact no sale whatever, and that this court will protect the pledgor from the strict fulfillment of the contracts of pledge in question, because they were unconscionable in their terms.

We are yet to hear any claim, substantiated by any fact disclosed by the record, that the sale of these policies *was not* in strict compliance with the terms of the agreements of pledge. The contracts gave the appellee the right to sell at public sale, without demand, advertisement, or notice to anyone, and to become the purchaser at any such sale freed of the equity of redemption of the pledgor. This is precisely what was done.

The appellant's criticism of the cases cited under the third point, on p. 13 of the main brief, is not justified. The decisions of this State, and in fact of all of the States are uniform that the parties to a pledge may provide therein for any method of disposing of the pledge, which is not in contravention of a statute, against public policy or fraudulent.

The form of contract in question has been before the highest Court of the State of New York many times. In *Gilette* v. *The Bank of America, 160 N. Y., 549,* it will be found that the contract is almost identical to the one at bar.

A similar contract was in question in *Fidelity Insurance Trust & Safe Deposit Co.* v. *Roanoke Iron Co, 81 Fed. Rep., 439-449.*

Our opponent further criticises these cases in the respect that not in a single instance does it appear that the pledgor himself became the purchaser, except in *Franklin National Bank* v. *Newcomb.* In this he is mistaken.

In Fidelity Ins. *v.* Roanoke (*supra*) it appeared that Gwiner held twelve bonds of the Roanoke Iron Co. of $1000 each as collateral security for a note. Thereafter the note became due, and not

having been paid, Gwiner had the collateral sold at the stock call of the Pittsburgh Stock and Oil Exchange, at which sale they were bought by Gwiner. No notice of the sale was given. The Court held:

> "The contention of the counsel for exceptants is that Gwiner being the pledgee of these bonds as collateral security for the payment of the note of $5000 executed to him by the Roancke Iron Co., could not become the purchaser thereof at a sale of the same. It is undoubtedly true that where a pledgee without authority, sells negotiable collateral paper, he cannot become the purchaser. (Colebrooke Coll. § 126.) *But this doctrine does not apply in a case like this, where the pledgee is given full power and authority on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice, or making any demand for payment.*"

He further criticises the cases cited in that it fails to appear in any, that the pledgee became the purchaser at a sale without notice.

Without burdening the Court with a critical examination of the cases cited, it is quite immaterial whether the fact appears or not. The Court of Appeals of the State of New York has repeatedly adjudicated that a contract of pledge, such as is in question, is valid and enforcible between the parties, and so long as the terms of the contract are strictly complied with, it is idle to argue that the sale is fraudulent, or the contract an unconscionable one.

C.

There is no merit in the contention that the Court below erred in allowing the claims rather

than reversing the action of the Referee and the District Court, and granting the trustee an opportunity to be heard. The matter of Livingston is not in point.

The appellant had his day in Court, but did not see fit to avail himself of the opportunity to substantiate his objections.

The record discloses that the matter was disposed of as upon an agreed state of facts. Both parties in effect moved for a direction.

At the conclusion of the hearing before the master, the following occurred which the appellant fails to call the Court's attention to:

> "*Mr. Czaki.*—I ask the Court to allow the claims of the Varick Bank of New York as filed upon the record and documents in evidence.
>
> *Mr. Crowley.*—I move for the disallowance of both of the claims, on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims, has not been proved, and no evidence from which that value can be ascertained and found by the court has been given so as to establish the balance.
>
> *Mr. Czaki.*—The attorney for the creditors request to know of the attorney for the trustee whether he rests his case under the objections as filed?
>
> *Mr. Czaki.*—I move that the Referee decide that the burden of proof in the proceedings is upon the trustee not having received any response to my question as to whether he had rested."

Counsel for the appellant unintentionally errs when he states:

> "At this hearing, the claimant Bank, offered in evidence his proofs of claim, and submitted sixteen stipulations of fact, all being done by the claimant voluntarily without any contention that the burden of proceeding in

the first instance was upon the trustee" (p. 5, Appellant's brief).

The record discloses that the stipulations of fact were mutual concessions, which in no way affected the question of the burden of proceeding.

If these stipulations are to be considered *wholly* as the evidence of the appellee, there can be no possible doubt that the burden of proceeding at once shifted to the appellant to sustain his objections.

If on the other hand they be considered as *mutual,* it leaves the question of the burden of proceeding where it had been and as though no concessions had been made.

Again, if they be considered as evidence in substantiation of the appellant's objections, the conclusion is inevitable that they lamentably fail in so doing, and that the Referee erred in directing judgment in favor of the appellant by disallowing the claims.

In the Matter of Livingston, 144 Fed. Rep., 97, the trustee offered no proof whatever, but at the close of the claimant's *prima facie* case who voluntarily assumed the burden of proceeding, moved that the claim be disallowed. The motion was granted, and the claim disallowed. This upon appeal was reversed, and the claim allowed as filed, thus clearly depriving the trustee of any opportunity to introduce evidence; quite a different situation than in the case at bar where the trustee had his day in Court, was requested to proceed under his objections, and refused to do so.

D.

A perusal of the record of the proceedings before the Referee, his opinion, that of the District Court and of the Court below, discloses that at

no time was any question made with reference to the special deposit of $6000 to the personal account of Jacob M. Mertens, and which was held by the appellee as additional security for the payment of its indebtedness.

The appellant has failed to file any assignment of error predicated upon the appellee's failure to credit this amount upon the partnership debt. It is now raised for the first time, and hence cannot be considered.

Stevenson *v.* Barbour, 140 U. S., 48;
Rowe *v.* Phelps, 152 U. S., 87.

The record does not contain a particle of evidence substantiating the appellant's contention with regard to this special deposit; hence, there is no such plain error that this court will take notice of, even though not assigned.

United States *v.* Peana, 175 U. S., 500.

The motion should be granted.

Respectfully submitted,
FREDERICK M. CZAKI,
Of Counsel.